

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
REPLY BRIEF**

75-4169

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

TRANS WORLD AIRLINES, INC.,

Petitioner,

—against—

CIVIL AERONAUTICS BOARD,

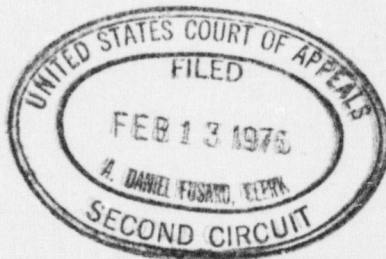
Respondent.

ON PETITION FOR REVIEW OF ORDER OF
THE CIVIL AERONAUTICS BOARD

REPLY BRIEF FOR PETITIONER

CARL S. ROWE
HAROLD L. WARNER, JR.
Attorneys for Petitioner
30 Rockefeller Plaza
New York, New York 10020

HENRY J. OECHLER, JR.
CHADBOURNE, PARKE, WHITESIDE
& WOLFF
30 Rockefeller Plaza
New York, New York 10020
Of Counsel



B
P/S

3

TABLE OF CONTENTS

	PAGE
I. The Board's OTC Restrictions Are Insignificant	2
(1) The "Going and Returning Together"	2
(2) The \$15 "Throwaway"	4
(3) The Prepurchase Requirement	6
CONCLUSION	6

TABLE OF AUTHORITIES

Cases:

<i>American Airlines, Inc. v. CAB</i> , 365 F.2d 939 (D.C. Cir. 1966)	5
<i>Pan American World Airways, Inc. v. CAB</i> , 380 F.2d 770 (2d Cir. 1967), <i>aff'd per curiam</i> by an equally divided court <i>sub nom. World Airways, Inc. v. Pan American World Airways, Inc.</i> , 391 U.S. 461 (1968)	6

C.A.B. Orders:

Order 74-10-106	6
Order 75-9-84	6

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT
No. 75-4169

TRANS WORLD AIRLINES, INC.,

Petitioner,

—against—

CIVIL AERONAUTICS BOARD

Respondent.

ON PETITION FOR REVIEW OF ORDER OF
THE CIVIL AERONAUTICS BOARD

REPLY BRIEF FOR PETITIONER

The Board argues that its OTC regulations do not breach the required distinction between charter and individually ticketed travel because the “cumulative effect” of the “elaborate set of restrictions” is such that “they demonstrate a substantial and profound difference between OTC travel and conventional travel.” (Board’s Brief, pp. 22-26).

The fact is that the Board’s OTC regulations permit the supplemental air carriers to sell individual tickets to members of the general public for point-to-point round trip transportation on a minimum four day trip,* provided only that such tickets are “purchased” 30 days in advance for international flights and 15 days in advance for do-

* On international flights the minimum duration of the OTC trip is seven days (§ 378a.10(d); 46a).

mestic flights.* Thus the Board's OTC regulations permit supplemental air carriers to engage in individually ticketed transportation in direct violation of the Act.

I.

The Board's OTC Restrictions Are Insignificant.

The Board, at pages 22-26 of its brief, emphasizes the following so-called "distinctions":

(1) The "Going and Returning Together"

Attempting to portray "togetherness", where "togetherness" is virtually non-existent, the Board argues that "OTC participants travel and return together as a group on both legs of the flight." (Board's Brief, p. 22). But every passenger on a regularly scheduled flight similarly travels together as a group with all the other passengers on the flight.

In both the case of the OTC participant and the individually ticketed passenger, the remaining fellow travelers more often than not are total strangers. The OTC traveler is one of 40 members of the general public, each one of whom has merely bought a ticket for round trip transportation. The seat companion of an OTC participant, in addition to being a stranger, may be a member of an entirely different OTC group.**

The same is true on the return leg of the OTC participant's round trip, which may be on a different carrier with seven other entirely different less-than-planeload groups (§ 378a.10(c); 46a).

* The Board anticipates reducing the restriction for domestic flights to seven days (17a).

** In an aircraft with 320 or more seats, there may be eight different OTC groups on one airplane.

The fact that the OTC traveler must return with the same group of 40 is equally insignificant. The OTC traveler determines when he wants to go and when he wants to return just like every other passenger. The travel agent then places him with 39 other passengers wishing to go and return at the same time. With all the OTCs available there is no more problem in doing this than in making reservations at the times any ordinary passenger wants.

Clearly the group "togetherness" on an OTC flight is not significantly different from that existing on a regularly scheduled trip. The OTC requirement that 40 of the 320 passengers on the outgoing leg of the round trip must fly "together" on the return leg does not create "a substantial and profound difference between OTC travel and conventional travel." (Board's Brief, p. 22).

The Board seems to consider significant the fact that the OTC passengers travel "as a group on all ground transfers between airports and hotels, and between destination points on the tour itinerary" (Brief, p. 23) and "stay together . . . on the ground." (p. 26 fn.). To the extent this implies that the OTC group is on a sightseeing tour it is clearly misleading. In any event, it is completely irrelevant. Since the destination is the only stop on the "tour", the only required "ground transportation" is the airport to hotel bus.

The Board cannot be serious when it argues that the affording of ground transportation from the airport to a hotel turns an OTC trip into a charter trip significantly different from individually ticketed travel. The individually ticketed traveler—like the OTC participant—must somehow find his way downtown from the airport. Certainly, no OTC passenger will be dragged onto the bus in order to keep the group of 40 together if he wants to get to the hotel or airport by other means.

The Board also argues that "participants stay at the same pre-selected hotels" (Brief, p. 23). That hotel accommodations are "pre-selected" has no significance here whatsoever. Moreover, in spite of the Board's implication to the contrary, there is no requirement that all 40 members of the group stay at the same hotel. The only "togetherness" requirement is the illusory requirement that the OTC group travel together on the aircraft (§ 378a.12; 48a). Although the existence of a requirement that all OTC passengers in the "group" stay at the same hotel would not in any event demonstrate that OTCs are significantly different from conventional scheduled service, OTC passengers can be, and frequently are, given an option as to which of several hotels they wish to use. Here, again, there is no real group "togetherness".*

(2) The \$15 "Throwaway"

The Board argues, at pp. 22-23 of its brief, that the OTC restrictions "severely limit passenger flexibility on the ground," adding that the "OTC participants must purchase, as part of the OTC price, specific accommodations and ground services selected by the tour operator."

This argument is entirely specious. The OTC participant is no prisoner on the ground. When he gets to London on a New York-London round trip, he is as free

* The Board also seems to consider significant the fact that petitioner offered no evidence to this Court of diversion from scheduled service. Of course, the question of diversion is again irrelevant since the only issue is whether the Board exceeded its statutory authority in failing to maintain the distinction between individually ticketed travel and charter travel. However, the Board itself admits that over 6,000 OTCs have been filed with the Board in only the past few months (Brief, p. 16 fn.). This is *prima facie* evidence that there has been diversion.

The fact that TWA has been a participant in OTCs (Board's Brief, p. 16 fn.) is equally irrelevant. Naturally, TWA must offer OTCs if it is to remain competitive.

as the individually ticketed passenger to travel from the airport by whatever means he chooses, and to stay with friends or relatives or to go to whatever hotel or other place of lodging he wishes. The \$15 worth of "accommodations", which must be provided for each night of the tour, is simply an extra added attraction to entice the public to buy a ticket for an OTC trip, rather than a regularly scheduled trip. There is no requirement that an OTC passenger use these accommodations. Indeed, the Board admits that "some prospective scheduled airline passengers . . . will use OTC's even in circumstances in which the passengers cannot use the OTC's land accommodations." (25a). Obviously this diversion of prospective scheduled passengers is because the OTC price will be "considerably lower than scheduled air fares, notwithstanding that OTC prices will cover sleeping accommodations and other ground services as well as air transportation." (5a).^{*} Furthermore, the Board states that it has imposed the \$15 per night accommodation requirement so as to enable "tour operators to offer vacation packages at prices which will attract participants." (25a).

Any traveler who knows he is going from New York to Honolulu in 15 days will take an OTC trip for \$361 instead of paying the regular coach fare of \$550 (87a). Whether or not he can utilize the OTC ground accommodations, he will still save about \$200.

^{*} Whereas it was apparent to the Court in *American Airlines, Inc. v. CAB*, 365 F.2d 939, 947 (D.C. Cir. 1966), that "the inclusive tour charge will always be at least 10% higher than the price of the lowest available fare offered by the competing scheduled airlines for comparable transportation", the OTC may be 50% or more *lower* than the lowest scheduled fare (87a).

(3) The Prepurchase Requirement

Finally, the Board argues that "[a]t least 30 days in advance of international flight departures and 15 days prior to domestic departures, OTC participants must contract and pay for a specifically identified flight." (Board's Brief, p. 23).

Manifestly, a prepurchase requirement does not turn a non-charter trip into a charter trip. Many regularly scheduled trips are sold on a prepurchase basis.* The vast majority of United Airlines' "passengers in scheduled service make their reservations within seven to ten days of departure." (United's Brief *Amicus Curiae*, p. 8). It is in this background that the Board, in its step-by-step development of low-cost bulk transportation, contemplates reducing the 15 day advance purchase requirement to 7 days (17a).

CONCLUSION

It is incumbent upon the Board to maintain the distinction between scheduled and supplemental air transportation under the Act. As this Court held in *Pan American World Airways, Inc. v. CAB*, 380 F.2d 770, 779 (1967), "it must be remembered 'that a prime concern of Congress was to maintain the integrity of the charter concept—to preserve the distinction between group and individually ticketed travel.' *American Airlines v. Civil Aeronautics Board*, supra, 348 F.2d at 354. See Conference Report, H.R. Rep. No. 1950, 87th Cong., 2d Sess. 14 (1967)." The

* For example, there is presently a 7-30 day domestic excursion fare with a 14 day advance purchase requirement and a 22-45 day international excursion fare with a 60 day advance purchase requirement. See C.A.B. Orders 75-9-84; 74-10-106.

Board under its OTC regulation would eradicate the required distinction when it permits the general public to go to a travel agent 15 days in advance of flight and buy a round-trip ticket with a minimum four day stay at prices far below the lowest scheduled fare.

Respectfully submitted,



CARL S. ROWE

HAROLD L. WARNER, JR.

Attorneys for Petitioner

30 Rockefeller Plaza

New York, New York 10020

HENRY J. OECHLER, JR.

CHADBOURNE, PARKE, WHITESIDE

& WOLFF

30 Rockefeller Plaza

New York, New York 10020

Of Counsel

Certificate of Service

I hereby certify that the foregoing Reply Brief for Petitioner has been served upon the following:

Richard P. Taylor, Esq.
Steptoe & Johnson
1250 Connecticut Avenue, N. W.
Washington, D. C. 20036

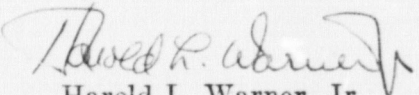
Robert M. Lichtman, Esq.
Lichtman, Abeles, Anker & Nagle, P. C.
1730 M. Street, N. W.
Washington, D. C. 20036

Glen M. Bendixsen, Esq.
Associate General Counsel
Civil Aeronautics Board
Washington, D. C. 20428

Howard S. Boros, Esq.
Boros & Garofalo, P. C.
1120 Connecticut Avenue, N. W.
Washington, D. C. 20036

Carl Lawson, Esq.
Antitrust Division
Appellate Section
Justice Department
10th and Pennsylvania Ave.
Washington, D.C. 20530

Michael A. Katz, Esq.
P.O. Box 66100
Chicago, Ill. 60666


Harold L. Warner, Jr.
Attorney for Petitioner

February 12, 1976

